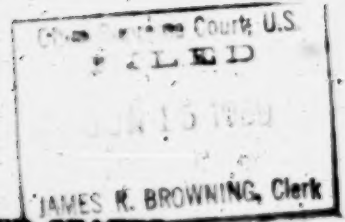


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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1959**

**No. 229**

**CONTINENTAL GRAIN COMPANY,**  
**Petitioner**

**versus**

**BARGE FBL-585**  
**and**  
**FEDERAL BARGE LINES, INC.,**  
**Respondents**

**MEMORANDUM IN OPPOSITION TO  
SUGGESTION OF MOOTNESS**

On June 10, 1960, this court requested the parties "to express their views on typewritten memoranda, by the close of business on June 16, 1960, as to whether the judgment rendered by the United States District Court for the Western District of Tennessee on December 15, 1958, in its cause No. 3487, in admiralty,<sup>1</sup>—Federal

<sup>1</sup> As explained hereunder, that action was not one in admiralty. It was a civil action which had been removed from the Tennessee state court. See R 43.

*Barge Lines v. Continental Grain Company*—has rendered this case moot”.

### Statement of the Case

On June 27, 1958—less than a week before the instant *in-rem* admiralty action for cargo damage was filed—Federal Barge Lines, Inc. sued the instant petitioner in a Tennessee state court, to recover \$75,000 for physical damage to the Barge *FBL-585*, resulting from the sinking in which the cargo damage had occurred.

After removal to federal court, the Tennessee civil action was tried by jury.

The jury, having been charged that the plaintiff's “recovery should be reduced in proportion to the extent that such remote contributory negligence, contributed to the sinking”, returned a general verdict for Federal Barge Lines in the sum of \$30,500—less than half the amount sued for.

### Argument

This court's suggestion of mootness is presumably predicated on the theory either that (1) petitioner may have lost its right to sue the barge *in rem*, by its failure to file a counterclaim in the Tennessee civil action; or (2) the Tennessee judgment forecloses this admiralty action under the doctrine of *res judicata* or collateral estoppel.

As previously pointed out, the barge was not a party to the Tennessee proceeding, and accordingly was not subject to a counterclaim.<sup>2</sup>

Further, Rule 82, FRCP, provides that the Civil Rules shall not be construed to extend the jurisdiction of the district courts. Since neither the Tennessee federal court, on its civil side, nor the state court in which the suit had originally been filed, could have jurisdiction over an admiralty action *in rem*, petitioner could not have sued the barge *in rem* in the civil action in Tennessee, where the barge was not to be found in any event.<sup>3</sup>

Neither *res judicata* nor collateral estoppel is applicable in this case, for two principal reasons.

First, identity of parties is lacking, since the Tennessee action was a personal action between Federal Barge Lines and petitioner, whereas the instant action is *in rem* against the barge.<sup>4</sup>

Second, even had there been identity of parties, the Tennessee judgment did not foreclose recovery by petitioner in this case.

<sup>2</sup> See petitioner's original brief, p. 4, note 2.

<sup>3</sup> See *Noma Electric Corp. vs Polaroid Corp.*, 2 FRD 454 (SD NY-1942); *Milburn vs Proctor Trust Co.*, 54 FS 989 (WD La.-1944).

<sup>4</sup> *The Blandon*, 39 F2d 933 (SD NY-1929); *The Eastern Shore*, 1928 AMC 327 (DC Md.); *The Samnanger*, 1924 AMC 517 (SD Ga.); *State vs Johnson*, 52 NM 229, 195 P2d 1017 (1948); *The Odorilla vs Baizley*, 128 Pa. 283, 18 A. 511 (1889). See also petitioner's reply brief, pp. 2-6, for authorities recognizing the basic difference between *in-rem* and *in-personam* actions.

Instructed to decide the case on comparative-negligence principles, the Tennessee jury returned a verdict for less than half the amount sued for. This was an implicit finding that Federal Barge Lines was itself partly at fault for the sinking.

Certainly this verdict cannot preclude recovery by petitioner in this case, on comparative-negligence principles, of at least part of its cargo damage resulting from the sinking.

It is accordingly respectfully submitted that the instant controversy is not moot.

Eberhard P. Deutsch  
Proctor for Petitioner

Deutsch, Kerrigan & Stiles  
Malcolm W. Monroe  
Of Counsel

June, 1960